



HOUSE OF LORDS,
SW1A 0PW

21 March 1984

23/3

Family Law (Financial Provisions)(Scotland) Bill

In his letter of 14 March George Younger seeks the agreement of colleagues to the introduction of a Bill to implement the recommendations made by the Scottish Law Commission in their Report on Aliment and Financial Provision (Scots Law Com No.76). The Bill would reform the law of Scotland along somewhat different lines to the law of England and Wales, not only as it now stands but also as it will be when modified by the Matrimonial and Family Proceedings Bill.

The differences between the Scottish proposals and the law of England and Wales can be justified. The establishment of statutory principles to be followed by the court is necessary in Scotland to provide a greater degree of certainty and consistency, whereas in England and Wales this is already provided by the statutory guidance contained in section 25 of the Matrimonial Causes Act 1973 and a well developed body of precedent.

I concur in the proposal and I endorse George Younger's intention to follow closely the recommendations of the Scottish Law Commission.

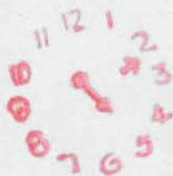
I am sending a copy of this to the other Members of H Committee and Sir Robert Armstrong.

LORD HAILSHAM OF ST. MARYLEBONE CH, F.R.S, D.C.L.

The Right Honourable
Viscount Whitelaw CH MC
Lord President of the Council
House of Lords
LONDON SW1A 0PW

Parliament Pt 12
Legislative Programme

22 MAR 1984



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cc: PS/SHTD
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Solicitor
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RESTRICTED

The Rt Hon the Viscount Whitelaw PC CH MC
Lord President of the Council
Privy Council Office
Whitehall
LONDON
SW1A 2AT

14 March 1984

Dear Willie,

FAMILY LAW (FINANCIAL PROVISIONS) (SCOTLAND) BILL

In November 1981 the Scottish Law Commission published a Report on Aliment and Financial Provision. I am now writing to seek your agreement and that of H colleagues to the preparation of a Bill aimed at implementing the recommendations of the Report essentially as they stand. This will fulfil one of the commitments in our Scottish Manifesto. Cabinet recently approved QL's proposal that such a Bill be included in the 1984/85 legislative programme.

ALIMENT

2. The present law recognises a complicated hierarchy of legal liability for aliment (ie support of others by reason of kinship or marriage) which it is generally agreed is outdated. Under the Commission's proposals the only remaining legal, as distinct from moral, obligation would be

- a. a reciprocal obligation between husband and wife (while their marriage lasts);
- b. an obligation on either parent to support any child (legitimate or illegitimate or accepted as part of the family) up to the age of 18 or, if receiving education or training, up to a maximum age of 25.

They also recommend improvements in the law relating to actions for aliment. These proposals represent a straightforward modernisation of the law and should not be controversial.

FINANCIAL PROVISION ON DIVORCE

3. The present law in Scotland on financial provision on divorce, while enabling either party to apply for a periodical allowance or capital sum or both, does not offer guidance on the objectives of financial provision and simply directs the court to make on an application, such order, if any, as it thinks fit. The Commission

criticised this lack of clarity and recommended that the court should make an order only if it was (a) justified by one or more of 5 principles and (b) reasonable having regard to the resources of the parties. The 5 principles which the Commission adduced were -

- i. Fair sharing of matrimonial property;
- ii. Fair recognition of contributions and disadvantages;
- iii. Fair sharing of the economic burden of child care;
- iv. Fair provision for adjustment to independence; and
- v. Relief of grave financial hardship.

4. Essentially the Commission's approach is that on the break up of a marriage there should be a fair sharing of all matrimonial property and that divorce should, so far as possible, constitute a clean break with any financial provision directed towards securing the independence of the parties rather than the indefinite continuation of the obligation of support. The Commission also recommend making available to the court a wide range of additional powers in relation to property adjustments on divorce such as the sale or transfer of property, the payment of capital sums by instalments and in particular the regulation of the use of the matrimonial home after divorce. Consonant with this approach they suggested that periodical allowances should be made only if the court was satisfied that a capital sum or transfer of property was not by itself appropriate and that periodical allowance should not be awarded for more than 3 years except in relation to the relief of grave financial hardship or to the fair sharing of the economic burden of child care notably where a parent was unable to earn because of the need to look after young children.

5. The question of periodical allowances will give rise to the main controversy. Ex-wives will wish support to continue; ex-husbands (and their second wives) supported by the Campaign for Justice in Divorce will continue to press strongly for the implementation of the Commission's proposals. An important consequential point is whether courts should have power to vary existing maintenance orders in accordance with the 5 principles. The Commission recommended against legislation with retrospective effect in part on principle and in part because it would involve a measure of unfairness to introduce a change in the rules after a decision on financial provision had been reached. An additional factor is that to change the rules could give rise to speculative litigation, much of it assisted by legal aid. In the light of a Court of Session decision in a 1983 case that a court has no power at present to award a periodical allowance for a fixed period, the Commission have made a supplementary recommendation that a court should be able to replace an order for periodical allowance made before the new legislation comes into force by an order for a fixed term; this would serve to reduce the amount of criticism from those who favour retrospection. I propose on this, as on other issues, to follow the recommendations of the Commission unless and until an overwhelming case for change is made out.

FINANCIAL EFFECTS

6. The Bill should have no direct effects on public expenditure and the indirect effects are hard to gauge. The establishment of the 5 principles may serve as encouragement to haggle over how much might be obtained under each heading or as guidelines for settlement. My guess is that initially there may be a temptation to drag on negotiations with some limited increase in legal aid costs, but that speedier settlements will result when a new pattern becomes established. Accordingly, the overall effect on legal aid should be marginal. Whether the

change in emphasis on capital payments will have any effect on DHSS assessments or otherwise is problematical, though I should wish to avoid a situation where we lay ourselves open to criticism that divorce settlements unfairly make potential recipients ineligible for benefits. In any event I do not consider the changes will have any marked effect on public expenditure. Any effect on the workload of the courts is also difficult to assess but it should not be great.

7. There are no EC implications.

OTHER EFFECTS

8. While the situation in relation to financial provision on divorce is markedly different in England and Wales, there is a natural tendency for critics to compare and contrast what they see as the good and bad features of each system. The implementation in the Matrimonial and Family Proceedings Bill of the somewhat different recommendations in the English Law Commission report on this topic has tended to highlight these. As indicated my intention is to stick closely to the recommendations of the Scottish Commission and to defend my decisions by reference to them.

9. I accordingly seek approval to implementation of the legislative recommendations in the Report, subject to adjustments found necessary on detailed consideration, in a Bill to be introduced in the 1984/85 session. I should be grateful if I might have colleagues' comments, or their concurrence, by the end of March.

10. I am copying this letter to other members of H Committee and to Sir Robert Armstrong.

*Yours sincerely,
George.*